Lin Wen-chih & Anor v Mycom Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2704 OF 2010
ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA
20 NOVEMBER 2013

Contract — Non est factum — Burden of proof — Whether plea available to plaintiffs — Whether plaintiffs as businessmen of considerable acumen unlikely to have signed documents without knowing what they were — Whether plaintiffs on balance of probabilities failed to prove their case by failing to rebut different version of case proven by defendant

In their case before the High Court the appellants pleaded that they agreed to sell 12,750,000 of their shares in a company ('the Veramax shares') to the respondents for RM55m ('purchase price') pursuant to a share sale agreement and that on the same day they executed that agreement, they also signed a document acknowledging receipt of the purchase price and a letter addressed to one Liu He Tian ('Liu') agreeing to accept a swap of shares in certain other companies ('the consideration shares') in lieu of payment of the purchase price. The appellants pleaded that they did not receive the purchase price from the respondent, and nor did Liu deliver to them the consideration shares. Therefore, they said, there had been a total failure of consideration of the share sale agreement and they were entitled to the return of the Veramax shares or, alternatively, payment of the RM55m or damages. The appellants pleaded *non est factum* in relation to both their letter to Liu and to the document they signed acknowledging receipt of the purchase price. They contended that not only were they Taiwanese nationals who did not understand English, but the import of those two documents was never explained to them before they signed it. The High Court dismissed the appellants' claim resulting in the instant appeal.

Held, dismissing the appeal with costs and affirming the decision of the High Court:

(1) The claim of *non est factum* was not available to the appellants. The court agreed with the trial judge that the appellants were not novice businessmen and would not have signed the documents without careful consideration. They were not 'hillbillies' but businessmen of considerable acumen as suggested by the assets they had. It was so unlikely as to be unbelievable that they would have signed any document in a foreign country without knowing what it was they were signing. The rejection of the appellants' *non est factum* plea meant that their claim that the

respondent failed to pay them the purchase price must fail because the appellants had agreed to accept the consideration shares in lieu of payment of the purchase price (see paras 24, 28 & 30).

(2) As the respondent had testified that the appellants were to receive the consideration shares in exchange for the Veramax shares and not cash, it was for the appellants to have adduced evidence to contradict that contention and if it took calling Liu to tip the balance in their favour, they should have called Liu to testify. The obligation was not on the respondent to have called Liu. The trial judge did not err when she held that the appellants had failed to prove their claim upon balance of probabilities whilst the respondent had succeeded in discharging the burden upon them to prove their version upon a balance of probabilities (see paras 37, 44 & 49).

[Bahasa Malaysia summary

Dalam kes mereka di hadapan Mahkamah Tinggi perayu-perayu memplid bahawa mereka bersetuju untuk menjual 12,750,000 saham mereka di dalam syarikat ('saham-saham Veramax') kepada responden-responden untuk RM55 juta ('harga belian') berikutan perjanjian jualan saham dan bahawa pada hari yang sama mereka melaksanakan perjanjian tersebut, mereka juga menandatangani dokumen akaun penerimaan harga belian dan surat dialamatkan kepada seorang yang bernama Liu He Tian ('Liu') bersetuju untuk menerima saham pertukaran dalam syarikat-syarikat tertentu yang lain ('saham-saham yang dipertimbangkan') sebagai ganti bayaran harga belian. Perayu-perayu memplid bahawa mereka tidak menerima harga belian daripada responden, dan Liu juga tidak menghantar kepada mereka saham-saham yang dipertimbangkan tersebut. Oleh itu, mereka menyatakan, terdapat kegagalan sepenuhnya pertimbangan terhadap perjanjian jualan saham dan mereka berhak kepada pemulangan saham-saham Veramax atau, secara alternatif bayaran sebanyak RM55 juta atau ganti rugi. Perayu-perayu memplid *non est factum* berkaitan kepada kedua-dua surat kepada Liu dan kepada dokumen yang ditandatangani mereka akuan penerimaan harga belian. Mereka berhujah bahawa bukan sahaja mereka warganegara Taiwan yang tidak memahami Bahasa Inggeris, tetapi apa yang penting mengenai kedua-dua dokumen tersebut tidak dijelaskan kepada mereka sebelum mereka menandatanganinya. Mahkamah Tinggi menolak tuntutan perayu-perayu mengakibatkan rayuan ini.

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan Mahkamah Tinggi:

(1) Tuntutan untuk *non est factum* tidak boleh dituntut oleh perayu-perayu. Mahkamah bersetuju dengan hakim bicara bahawa perayu-perayu bukan ahli perniagaan baru dan tidak akan menandatangani dokumen tanpa pertimbangan yang teliti. Mereka bukan 'hillbillies' tetapi ahli

perniagaan yang pintar seperti yang ditunjukkan oleh aset-aset mereka. Adalah tidak mungkin kerana sukar untuk mempercayai bahawa mereka akan menandatangani apa-apa dokumen di negara asing tanpa mengetahui apa yang mereka tandatangani. Penolakan rayuan *non est factum* perayu-perayu bermaksud tuntutan mereka bahawa responden gagal untuk membayar mereka harga belian mesti gagal kerana perayu-perayu telah bersetuju untuk menerima saham-saham yang dipertimbangkan sebagai ganti bayaran harga belian (lihat perenggan 24, 28 & 30).

(2) Memandangkan responden telah memberi keterangan bahawa perayu-perayu akan menerima saham-saham yang dipertimbangkan dalam pertukaran dengan saham Veramax dan bukan tunai, adalah untuk perayu-perayu mengemukakan keterangan untuk menyangkal hujahan tersebut dan jika ia mengatakan dengan memanggil Liu akan menjadi faktor penentu untuk memihak kepada mereka, mereka patut memanggil Liu untuk memberi keterangan. Tanggungjawab bukan ke atas responden untuk memanggil Liu. Hakim bicara tidak tersilap apabila beliau memutuskan bahawa perayu-perayu telah gagal untuk membuktikan tuntutan mereka atas imbangan kebarangkalian sementara responden telah berjaya dalam melepaskan beban ke atas mereka untuk membuktikan versi mereka atas imbangan kebarangkalian (lihat perenggan 37, 44 & 49).]

Notes

For cases on burden of proof, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5676–5683.

Cases referred to

Chai Then Song v Malayan United Finance [1993] MLJU 128; [1993] 2 CLJ 640, HC (refd)

Chin Leong Soon & Ors v Len Chee Omnibus Co Ltd & Anor [1970] 2 MLJ 228; [1969] 1 LNS 28, FC (refd)

Chow Yee Wah v Choo Ah Pat [1978] 2 MLJ 416; [1978] 2 LNS 32, PC (refd)

Ismail bin Savoosah & Ors v Hajee Ismail (1889) 4 Ky 453 (refd)

John Jeffry Madan v Harish Kumar Arora & Anor [1991] 2 CALLT 182 (refd)

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Saunders v Anglia Building Society [1970] 3 All ER 961; [1971] AC 1004 (refd)

Subramaniam v Retnam [1966] 1 MLJ 172; [1965] 1 LNS 169, HC (refd)

Sundram v Arujunan & Anor [1944] 3 MLJ 361; [1994] 4 CLJ 300, SC (refd)

Tan Kim Hoo & Anor v PP [2009] 3 MLJ 151, FC (refd)

Tan Lai Wah v First National Bank of Chicago (1984) 4 PCC 251, PC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102, 114(g)

Appeal from: Civil Suit No 01–22–78 of 2000 (High Court, Kuala Lumpur)

Karpal Singh (Ramkarpal Singh and CW Loh with him) (Karpal Singh & Co) for the appellant.

Porres Royan (Prem Ramachandran with him) (Kumar Partnership) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellants ('Lin Wen Chih and Lin Wen Chuan') appealed to this court against the decision of the High Court given on 3 September 2010 where the appellants' claim against the respondent ('Mycom Bhd') was dismissed with costs.

[2] Below is the summary of the appellants' pleaded case reproduced from the written submission for the appellants:

(a) the appellants were, at all material times, the registered and beneficial shareholders of 18,862,000 shares in a company known as Veramax Sdn Bhd ('Veramax');

(b) the appellants agreed to sell 12,750,000 of those shares, representing 51% of the paid up capital of Veramax to the respondent ('the said sale') for a purchase consideration of RM55,000,000 ('the said purchase price');

(c) the said sale is reflected in a share sale agreement dated 1 March 1996 ('the said share sale agreement');

(d) cl 3.1 of the said share sale agreement stipulated certain obligations to be fulfilled by the appellants as a pre-condition to payment of the said purchase price ('the said obligations');

(e) the appellants did perform the said obligations; simultaneous to the execution of the said share sale agreement, the appellants were asked to sign the following two documents:

(i) a letter dated 1 March 1996 from the appellants to one Liu He Tian ('Liu') wherein the appellants agreed to accept, in lieu of the said purchase price, the transfer of shares listed of six companies to them ('the said consideration shares')('the first supplementary agreement'); and

(ii) a document entitled 'acknowledgement receipt' whereby the

appellants (purportedly) acknowledged receipt of the said purchase price towards full and final settlement of the said sale ('the said acknowledgment').

(f) as the first supplementary agreement and the said acknowledgment of receipt ('the said two agreements') were not explained to them and as they were Taiwanese nationals who are not able to speak, read or write English and did not understand the import and meaning of same, the appellants pleaded *non-est factum* in respect of the first supplementary agreement and the said acknowledgement of receipt;

(g) alternatively, the appellants pleaded they were induced by the representations of the director of the respondent, one Dato' Yap Yong Song and one Ng Sing Hua, the respondent's corporate advisor, that they would receive the said purchase price upon execution of the said two agreements;

(h) the respondent was in breach of the said share sale agreement, particularly cl 2.0 thereof, in failing to make payment of the said purchase price to the appellants;

(i) alternatively, Liu did not deliver to the appellants the said consideration shares and the duly executed share transfer forms and in the circumstances, the said purchase price was still due and owing from the respondent to the appellant;

(j) the respondent also failed to make payment of RM3,295,453 pursuant to cl 11.2 of the said share sales agreement to the appellants; and

(k) in the circumstances, there was a total failure of consideration of the said share sale agreement.

[3] The appellants sought, inter alia, the following remedies:

(a) a declaration that from the failure to pay the purchase price of RM55,000,000 there was a failure of consideration and the appellants were entitled to the return of their shares;

(b) alternatively, from the failure of Liu He Tian to deliver to the appellants the consideration shares and executed share transfer forms therefor, there was a failure of consideration and the appellants were entitled to the return of their shares; and

(c) alternatively, damages.

[4] For convenience, we adhere to the references used in the appellants' summary.

[5] From the foregoing, the key components that need to be addressed are:

(a) *non est factum*; and/or

(b) total failure of consideration.

FINDINGS OF TRIAL COURT AND APPEALS THEREON

[6] The appeal before us involved findings of fact. It concerns judicial appreciation of the facts. In *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 (CA) Gopal Sri Ram JCA (as he then was), writing the judgment of the Court of Appeal, discussed authorities where a decision arrived at by a trial court may be set aside. Failure of judicial appreciation of the evidence was described as an instance for appellate interference.

[7] Although the expression is used time and again, we express caution with regard to the use of the term 'appellate interference', as the word 'interference' implies doing something that ought not to be done. We encourage the use of the word 'intervention' instead, and we would express the appellate function as 'appellate intervention to correct an error of law or principle, or fact or appreciation of fact which led the trial court to a decision it would otherwise not have arrived at'.

[8] Appellate intervention to correct such an error cannot, in our view, be confined to failure of judicial appreciation of the evidence alone, for judicial appreciation of evidence pertains to a finding of fact, while it is the judicial appreciation of the facts of the case, which includes the undisputed facts on the pleadings, the agreed facts and findings on the disputed facts, which leads, with application of law, to the decision appealed from. Whereas judicial appreciation of the evidence pertains to consideration of the evidence for the purpose of making a finding of fact on a disputed fact.

[9] With the terminology used thus elucidated, we turn to the subject of appellate approach to findings of fact and decisions by the trial court.

[10] It was submitted for the respondent, citing *Chow Yee Wah v Choo Ah Pat* [1978] 2 MLJ 416; [1978] 2 LNS 32 (PC): *Tan Kim Hoo v PP* [2009] 3 MLJ 151 (FC); *Sundram v Arujunan & Anor* [1944] 3 MLJ 361; [1994] 4 CLJ 300 (SC), that it is 'trite law that an appellate court will generally be reluctant to interfere with the trial judge's findings of fact which are entitled to great weight on account of the audio visual advantage enjoyed by a trial judge in the assessment and appreciation of the oral evidence of witnesses.'

[11] Again we would say a degree of caution is necessary. The specific audio visual advantage that a trial judge has is in respect of the assessment of the credibility of the oral evidence, being the witness examined and cross-examined before the trial judge, and the assessment of weight of such non-documentary evidence produced and examined before him. The findings of fact by the trial judge on such evidence is entitled to great weight, and unless that finding flies in the face of the mute evidence, cannot warrant appellate intervention. This exception applies for mute evidence and not for oral evidence since the assessment of credibility is not a numbers game. If a trial judge having heard the witnesses testify and tested before him accepts the testimony of one witness and rejects that of other witnesses, and records in his judgment that he has considered the testimony of those other witnesses but gives reasons for rejecting them, then his finding must stand.

[12] Further, the findings and decision of a trial judge is entitled to stand unless it is demonstrated there is an error of law or principle or fact or appreciation of evidence and fact which led the trial judge to a decision he would not otherwise have arrived at. This is notwithstanding that it is provided that an appeal is heard as a rehearing, because the trial court is the court in which the original jurisdiction resides, and an appellate court is authorised to exercise the powers of the trial court only where the appeal succeeds.

[13] That is not to say that the appellate court cannot examine the process, be it procedure or reasoning, of the court of original jurisdiction. This is substantially the same principle applied in examination of the process of decision making in judicial review.

THE APPEAL GROUNDS

[14] It was submitted before this court that the learned judicial commissioner had overlooked undisputed pleaded facts that:

(a) no payment was made under the share sale agreement; and

(b) no consideration shares were delivered and transferred under the first supplementary agreement.

[15] It will be recalled from the foregoing that the appellants had signed, at the same time as the share sale agreement, a letter to Liu referred to as 'the first supplementary agreement' and an acknowledgement of receipt referred to as 'the said acknowledgement'. In respect of these, the appellants claimed *non est factum*, and it was submitted that since:

(a) they were Taiwanese nationals who are not able to speak, read or write English; and

(b) because the first supplementary agreement to one Liu He Tian and the said acknowledgement were not explained to them

they did not understand the important and meaning of these documents referred to as 'the said two agreements'.

[16] In support of the *non est factum* claim, it was submitted that no reasonable man would have signed the purported acknowledgment of receipt of the sale price of RM55,000,000 for the sale of 12,750,000 shares of Veramax Sdn Bhd to the respondent Mycom Bhd, when no cash payment of RM55,000,000 was received from the latter nor was the consideration shares and the duly executed share transfer forms delivered by Liu.

[17] This launched the submission:

(a) if the claim of *non est factum* succeeds, there was a total failure of the consideration from the failure of the respondent Mycom Bhd to pay the agreed RM55,000,000 under the share sale agreement; or

(b) alternatively, if the claim of *non est factum* fails, from the failure by Liu to deliver the 'consideration shares' together with the valid and registrable transfer forms

the sale of shares became null and void and the appellants are entitled to the return of the 12,750,000 Veramax shares from the respondent, or alternatively, payment of RM55,000,000 or damages.

NON EST FACTUM

[18] We, therefore, address the question of *non est factum* first.

[19] It is a general rule that a party is normally bound by his signature on a document. Counsel for the respondent submitted that, in *Tan Lai Wah v First National Bank of Chicago* (1984) 4 PCC 251, the Privy Council held:

> The plea of *non est factum* can only rarely be established by a person of full capacity and although it is not confined to the blind and illiterate any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning. The burden of establishing a plea of *non est factum* falls on the party seeking to disown the document and that party must show that in signing the document he acted with reasonable care. Carelessness (or negligence devoid of any special, technical meaning) on the part of the person signing the document would preclude him from later pleading *non est factum* on the principle that no man may take advantage of his own wrong; it is not, however, an instance of negligence operating by way of estoppel.

[20] That submission and citation is incorrect. The report of the case from the book published in 1990 *The Privy Council Cases Malaysia Singapore Brunei 1875–1990* by Professor Dato' Dr Visu Sinnadurai shows it was a very brief dismissal of an appeal from the decision of the Court of Appeal of Singapore in *The First National Bank of Chicago v Tan Lai Wah* [1981] 2 MLJ 100 (CA), which had overturned the decision of the High Court. It was the High Court of Singapore that referred to the above passage, which was cited from *Saunders v Anglia Building Society* [1970] 3 All ER 961; [1971] AC 1004 (HL) also known as *Gallie v Lee & Anor*. The High Court rightly cited the principle, but had allowed the defence of *non est factum*. Of that, Lord Diplock in the Privy Council in *Tan Lai Wah v First National Bank of Chicago* had only this to say:

> … The only defence persisted in before their Lordships was one of *non est factum* to the guarantee which was signed. It was first raised some fifteen months after the defence had originally been filed. The learned trial judge surprisingly upheld that defence. His judgment was reversed by the Court of Appeal for reasons with which their Lordships can find no fault. Their Lordships would merely refer to the last sentence of the Court of Appeal's judgment on this particular issue:
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> It is also our view that having regard to her long experience as a land broker and other spheres of business as previously set out, factors which the learned trial judge appeared to have not considered, her mere assertion that she thought the document she signed was one guaranteeing her a half share in [that parcel of land] was unbelievable …

[21] The principle, a person is bound by his contract regardless that he is ignorant of the language it is written in, is well established. The case of *Subramaniam v Retnam* [1966] 1 MLJ 172; [1965] 1 LNS 169 referred to *Ismail bin Savoosah & Ors v Hajee Ismail* [1889] 4 Ky 453 at p 458 where Wood AG CJ said:

> It was argued that the defendant being ignorant of the English language he is to be excused on that account from the performance of his contract, but it is to my mind clear that in the common principles which govern the law of contract, the person who contracts by a written document, whether or not he understands the language in which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained …

[22] *Non est factum* is Latin for 'it is not my deed'. A successful plea of *non est factum* makes the contract or document signed void ab initio. A plea of *non est factum* means that they signed the two documents by mistake. Mistake, however, is not so much because one does not know the contents of the documents that one is signing, but that it was or turned out to be of a character entirely different from what is thought to be signed. This may be illustrated by

Chin Leong Soon & Ors v Len Chee Omnibus Co Ltd & Anor [1970] 2 MLJ 228; [1969] 1 LNS 28 (FC) where Suffian Ag LP (as he then was) said:

> Her claim is clearly based on the doctrine of *non est factum*, which means that if a person, owing to an error, executes a legal document which is of an entirely different character from that which he intended to sign, he is entitled to found his claim on it or to plead it as a defence if he is sued on the document …

[23] From the examination of the grounds of judgment by the learned judicial commissioner, we find the issue and the law on *non est factum* was dealt with adequately.

[24] Deliberating upon the above and the facts before the court, we agree with the learned judicial commissioner, that the appellants were not novice businessmen and would not have signed the documents without careful consideration. To put it directly, the appellants were not 'hillbillies', but businessmen of considerable acumen as their assets suggest, they would be so unlikely as to be unbelievable to have signed any document in a foreign country without knowing what it is that they were signing.

[25] We noted that further and/or alternative pleading of misrepresentation by one Dato' Yap Yong Song and one Ng Sing Hua that the appellants would receive the consideration for the sale of their shares (para 8).

[26] To rely upon the representation of the purchaser of their shares to the alleged representations of a director and a corporate business adviser of the purchaser who had agreed and therefore was obliged to pay to the appellants the agreed consideration of RM55,000,000 is equally unbelievable and for the same reasons above. Even if it is true, it is incomprehensibly careless. In *Chai Then Song v Malayan United Finance* [1993] MLJU 128; [1993] 2 CLJ 640, James Foong J (as he then was) held, after reviewing case law:

> … I find the aforesaid authorities laid down sound principles of law on persons executing blank documents. A person who choose to be careless, or not bothered to find out the contents therein, or relied completely upon others to complete the same, is responsible for his own actions and he is prevented from denying the contents therein do not bind him.

[27] Even more to the point is the elucidation contained in the judgment of Lord Pearson in *Saunders v Anglia Building Society* that:

> But the person who signs the documents in this way ought to be held bound by them, and ought not be entitled to avoid liability so as to shift the burden of loss on an innocent third party. The whole object of having documents signed by him is that he makes them his documents and takes responsibility for them.

[28] We, therefore, hold that the claim of *non est factum* is rightly not available to the appellants and that their appeal on this ground must fail.

TOTAL FAILURE OF CONSIDERATION

[29] We return to the main ground of the appellants' appeal. We accept that on the face of it, the proposition that if a person sells something for a price and does not get paid with the monetary consideration agreed to, there is a breach. And even if that person had agreed to be paid by delivery to him of other shares, but those shares were not delivered to him, there is a breach. Such a breach is a total failure of consideration. This was essentially how the appellants' claim was pleaded:

(a) there was a breach because the respondent failed to pay the RM55,000,000 under the share sale; or

(b) there was a breach because Liu did not deliver to the appellants the consideration shares and the executed share transfer forms described in the first supplementary agreement.

[30] The rejection of the appellants' claim as pleaded of *non est factum* with regard to the two agreements referred to at paras 2(e) and 2(f), means that the claim that the respondent failed to pay the purchase price of RM55,000,000 must fail because the appellants had, by the first supplementary agreement, agreed to accept the consideration shares in lieu thereof.

[31] There remains, however, the matter of the alleged failure to deliver the consideration shares and share transfer forms to the appellants in lieu of the cash payment of RM55,000,000 and that this amounted to a total failure of consideration.

[32] The learned judicial commissioner summed up the submissions for the appellants on this issue as follows:

> In respect of the letter dated 1 March 1996 sent by the plaintiffs to Mr Liu He Tian the counsel for the plaintiff submits that there is no mention of 'authorisation' authorising Liu to deliver the shares certificates relating to the consideration shares together with the duly executed and registrable interest share transfer forms to AHT in satisfaction of the monies due and owing. The plaintiff further submits that the letter cannot be considered by the court. Even if it was to be considered, it clearly shows a total failure of consideration on the part of the defendant. Furthermore, according to the plaintiffs there is no evidence that the said consideration shares were eventually transferred by Liu to AHT.

[33] We examined the statement of defence. Paragraphs 1–6 of the statement

of claim were not disputed. Paragraphs 7–11 of the statement of claim were denied and the appellants herein were put to strict proof.

[34] The term strict proof does not mean proof beyond reasonable doubt, but the normal standard of proof in civil proceedings, of upon a balance of probabilities. From the foregoing, it is evident that by the undisputed facts at paras 1–6, and the evidence adduced in respect of paras 7–11, the appellants had placed before the court evidence in support of their claim which if uncontradicted discharges the burden that is upon them. From the record the evidence so stood.

[35] The defence that was adopted was that there was more to the case than set forth in the statement of claim. It began with an unnumbered paragraph in the statement of defence as follows:

> Sebagai jawapan beberapa pengataan yang dibuat di dalam pernyataan tuntutan, defendan menegaskan dan menyatakan seperti berikut:
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> (a) melalui dua perjanjian vang dimasuki serentak dengan perjanjian jualan saham pada 1 Mac 1996 (kemudian dari ini dirujuk bersama sebagai 'perjanjian-perjanjian tersebut') di antara plaintif-plaintif dan seorang yang bernama Liu Ho Tien @ Liu He Tien ('Liu') dan Ayer Hitam Tin Dredging (M) Bhd ('AHT'), plaintif-plaintif:
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> (i) telah bersetuju untuk menerima saham-saham balasan (sepertimana yang dirujuk dalam pernyataan tuntutan) sebagai ganti bagi harga pembelian RM55,000,000 yang kena dibayar oleh defendan kepada plaintif-plaintif dan sebagai penyelesaian penuh dan muktamad perjanjian jualan saham tersebut ('perjanjian Liu'); dan
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> (ii) memberi kuasa kepada Liu untuk menyerahkan sijil-sijil bagi saham-saham balasan tersebut bersama-sama dengan borang-borang pindah milik pendaftaran vang telah dilaksanakan, kepada AHT sebagai penjelasan terhadap wang yang dihutang oleh plaintif-plaintif kepada AHT ('perjanjian AHT tersebut'),
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> (b) Perjanjian Liu tersebut adalah terbukti dalam surat plaintif-plaintif bertarikh 1 Mac 1996 kepada Liu. defendan akan merujuk kepada perjanjian Liu dan Perjanjian AHT di perbicaraan kelak untuk kesan dan maksud terma-terma sepenuhnya; dan
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> (c) berikutan dengan perjanjian-perjanjian tersebut diatas, plaintif-plaintif telah mengakui penerimaan harga pembelian RM55,000,000 dengan melaksanakan dokumen bertajuk *'Acknowledgement Receipt'* sebagai penyelesaian dan penjelasan tuntutan plaintif-plaintif disini ('penerimaan tersebut') dan selepas itu menyebabkan Liu menyerahkan saham-saham balasan tersebut kepada AHT sebagai penyelesaian keberhutangan plaintiff kepada AHT.

[36] The translation is as follows:

> In answer to the several allegations made therein, the defendant avers and states as follows:
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> (a) by two agreements entered into simultaneously with the share sale agreement on the 1 March 1996 ('the said Agreements') between the plaintiffs and one Liu Ho Tien @ Liu He Tien ('Liu') and Ayer Hitam Tin Dredging (M) Bhd ('AHT'), the plaintiffs:
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> (i) agreed to accept the consideration shares (as described in the statement of claim) in lieu of and in full and final settlement of the purchase consideration of RM55,000,000 which was due from the defendant to the plaintiffs pursuant to the share sale agreement ('the Liu agreement'); and
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> (ii) authorised Liu to deliver the share certificates relating to the consideration shares together with duly executed and registrable share transfer forms to AHT in satisfaction of monies due and owing from the plaintiffs to AHT ('the AHT agreement').
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> (b) the Liu agreement is evidenced in a letter dated the 1 March 1996 from the plaintiffs to Liu. The defendant will refer to the Liu agreement and the AHT agreement at the trial of the action herein for the full terms and effect thereof; and
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> (c) following the said agreements as aforesaid, the plaintiffs acknowledged receipt of the purchase consideration of RM55,000,000 in satisfaction and in discharge of the plaintiffs' claim herein by executing a document entitled acknowledgement receipt ('the receipt') and thereafter caused Liu to deliver the consideration shares to AHT in satisfaction of the plaintiffs' indebtedness to AHT.

[37] The issue raised at the trial and in the appeal before us is that the respondent Mycom Bhd failed to call Liu He Tian as a witness. This is how the learned judicial commissioner dealt with the issue:

> The learned counsel for the plaintiff further submits that it was therefore crucial for the defendant to have called Liu as a witness. However the plaintiff made no attempt to discharge their burden to call their agent Liu He Tian. According to the evidence given by DW2 Liu was the plaintiffs' agent. The defendants had called Chew Teck Hong and Ng Sing Hua to give evidence as to the transactions between the Parties. DW2, Tan Sri Yap gave evidence and confirmed that the plaintiffs were given in the basket of consideration shares in exchange and this is confirmed by DW3 when he was asked during his cross-examination:
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> Q: What about document at pp 191 and 192?
>
> A: This is basket of shares … he has agreed to accept as an exchange to his 51% shares during negotiation time. He is aware of this basket of shares ie the vendors were aware. So on that day this was prepared for him to sign … which he signed … no dispute on the same day about this basket of shares.

DW3 also gave evidence that it was to be a swapping of shares and not cash. He also gave evidence that he had explained the terms of the agreement to the plaintiffs in Mandarin.

PW1 confirmed during cross-examination that the Mycom share agreement was signed by the plaintiffs in the presence of their lawyer at that time, Mr Chung Tau Yong. The said lawyer had also attended the meeting at the defendants' office on 1 March 1996.

Section 101 of the Evidence Act provides that …

Section 102 of the same Act, *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1 said:

… Therefore the burden is on the plaintiff to prove the facts which he asserts. It is the plaintiff who should have call or attempted to call Liu as a witness to support their assertion that the consideration shares were never transferred. Their failure to call Mr Liu to testify must surely mean that the plaintiffs have failed to discharge the said burden.

[38] By their memorandum of appeal, the appellants relied upon the ground that the learned judicial commissioner erred when she held that the appellants herein should have called Liu He Tian as a witness:

(a) when the said burden was clearly on the defendant having regard to the pleaded defence that Liu had acquired the purported consideration shares from the defendant vide a put option and caused the said consideration shares to be transferred to Ayer Hitam Tin Dredging (M) Bhd ('AHT') in satisfaction of the plaintiffs' indebtedness to AHT (Ground 4); and

(b) as it is clear that the defendant's entire defence is premised on its assertion that Liu had transferred the said consideration shares to AHT as reflected in para 3(c) of the defence as follows This is especially so when it was not in dispute that the plaintiffs did not receive acknowledgement of receipt document. (Ground 6)

[39] We examined the pleadings again. It is in the appellants' statement of claim that they were not paid the RM55,000,000 and alternatively that Liu had failed to deliver the consideration shares and duly executed share transfer forms to the appellants. The defence is, as set out in paras 35 and 36 above, essentially for this purpose that Liu was authorised by 'the AHT agreement' to 'deliver the share certificates relating to the consideration shares together with duly executed and registrable share transfer forms to AHT in satisfaction of monies due and owing from the plaintiffs to AHT' ('the AHT agreement').

[40] The reply by the appellants is, from the translation, as follows:

2 In reply to paras 3 and 4 of the defence, the plaintiffs repeat paragraphs 6

> to 10 of the statement of claim. The plaintiffs aver that the said Liu Ho Tan @ Liu He Tien did not deliver the consideration shares as referred to at para 6 b of the statement of claim to the plaintiffs and the duly executed share transfer forms and in the circumstances, the sum of RM55,000,000 is still due and owing from the defendant to the plaintiffs.
>
> 3 By reason of the matters set out above, para 4 of the defence is strictly denied.

[41] Though denied, the key part of denial is of any debt to AHT and that Liu did not deliver the consideration shares and the duly executed share transfer forms to the appellants. The latter is not denied by the respondent, and in any case the role of Liu was that of a courier. Whether or not there was any debt owed to AHT does not require the testimony of Liu and in our view the issue of failure to call Liu is nothing more than a red herring. Neither is it the appellants' case that AHT continued to trouble the appellants for a debt. The issue whether the appellants owed anything to AHT does not require Liu and therefore the non-calling of Liu by the respondent warrants no further consideration.

[42] The oral testimony of the first appellant, Lin Wen Chih in cross-examination at pp 94, 97, 98, 107, 108, 115 of the record of appeal, and (DW1) Choo Tong Kin @ Chew Tong Kim at pp 126, 141, 142, 143, 156, (SD2) Tan Sri Dato' Yap Yong Seong at p 162, (SD3) Ng Sing Hwa at pp 195, 198, 199, 201, 202, as well as the documents at p 265 (the settlement agreement dated 1 March 1996 between the appellants as vendors and AHT), p 433 (letter 1 March 1996 by appellants to Liu He Tian), p 609 (form of transfer of securities dated 6 April 1996, p 611 (certificate of registered holder of shares dated 10 April 1995) were referred to as providing ample evidence that the appellants did receive the benefits.

[43] In the settlement agreement dated 1 March 1996, it was clearly stated that the appellants, as the vendors therein, had requested AHT to accept 'the consideration shares' quoted on the Kuala Lumpur Stock Exchange/Singapore Stock Exchange and in lieu of cash, in full, final and complete payment of the vendors' indebtedness and the AHT advance and AHT has agreed to do so upon the terms and conditions thereinafter contained.

[44] Proof in respect of a disputed fact is not confined to specific evidence. A party is entitled to rely on any evidence available. The only question is whether the evidence adduced is, unless contradicted by other evidence, sufficient to discharge the burden of proof that is upon that party. While in criminal cases the burden upon the prosecution is proof beyond reasonable doubt, the burden in civil cases is upon a balance of probabilities. The distinction is not merely that the burden of proof in civil cases is lower than in criminal cases, but that

in civil cases it is upon a balance between the evidence adduced by the respective parties. Since the respondent had adduced evidence as described above, it is for the appellants to have adduced evidence to contradict the same, and if took calling Liu to tip the balance in favour of the appellants, then it is for the appellants to call Liu and not the respondent who owes no obligation to call witnesses as demanded by the appellants. This process is sometimes called a shifting of the burden of proof from the party upon whom the burden originally rested to the other party as the proceedings went on and he had adduced at least some evidence in discharge of the burden upon him. Certainly, therefore, there is no reason to exercise the discretionary power to draw an adverse presumption under s 114(g) of the Evidence Act 1950 when in this case the respondent chose not to call Liu but to rely on other evidence.

[45] Even though the learned judicial commissioner referred to *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1 (CA) and the adverse inference applied in that case, she did not apply any adverse inference in this case and held only that they failed to discharge the burden, which as we have explained above, shifted to the appellants if they seek to contradict the evidence adduced by the respondent:

> Therefore the burden is on the plaintiff to prove the facts which he asserts. It is the plaintiff who should have call or attempted to call Liu as a witness to support their assertion that the consideration shares were never transferred. Their failure to call Mr Liu to testify must surely mean that the plaintiffs have failed to discharge the said burden.

[46] The learned judicial commissioner conducted an extensive consideration of the evidence of SP1 Lin Wen Chih and the issues raised. The key witness for the respondent is SD2 Tan Sri Dato' Yap Yong Seong. The learned judicial commissioner clearly accepted his testimony which had been subjected to extensive cross-examination.

[47] In *John Jeffry Madan v Harish Kumar Arora & Anor* [1991] 2 CALLT 182 (HC). A Bhattacharjee J put it this way:

> 3 As pointed out by the Privy Council in *Khoo Sit Hoh v Lim Thean Tong*, (1912 Appeal Cases 323), when an appellate Court is to express opinion on the credibility of conflicting witnesses whom it has not seen or heard or questioned, it must of necessity be greatly influenced by the opinion of the trial judge, who sees the demeanour of the witnesses and can estimate their intelligence, position and character in a way not available to the appellate Court. Of course, it may be that in deciding on evidence, the trial Court has clearly failed on some point to take proper account of particular circumstances, or given credence to testimony which turns out to be substantially inconsistent with itself, or with indisputable facts. But except in rare cases of that character, a Court of appeal shall hesitate long before it disturbs the findings of a trial judge based on appreciation of evidence. These observations in

Khoo sit Hoh have been fully endorsed by the Privy Council in the later decision in *Sitalakshmi Ammal v Venkata Subrahmanian*.

[48] Although it is true that the learned judicial commissioner did not directly address the question as to what to make of the rights of the appellants who sold 12,750,000 Veramax shares for RM55,000,000 but received neither the cash consideration nor the consideration shares and duly executed share transfer forms agreed to be received in lieu of cash payment, it is clear she was considering the question of whether the respondent herein had, on the evidence they had adduced, discharged the burden of proof in respect of their version, including that the plaintiffs had authorised Liu He Tian to transfer the consideration shares to satisfy the appellants indebtedness to AHT. In our view, whether the consideration shares were physically transferred or sold to do so is immaterial so long as the appellants indebtedness were discharged. As mentioned earlier above, the cross-examination of SP1 elicited evidence that the appellants owed sums to AHT which were discharged from the proceeds of the consideration shares.

[49] We hold that the learned judicial commissioner, on the particular facts of the proceedings in this case, did not err in holding that it is for the appellants to have called Liu He Tian, that the appellants have failed to prove upon a balance of probabilities their claim against the respondent herein while the respondent succeeded to discharge the burden upon them to prove their version upon a balance of probabilities. We find no cause for appellate intervention.

[50] We dismiss the appeal with costs.

Appeal dismissed with costs and decision of the High Court affirmed.

Reported by Ashok Kumar